NO. 92-276

Supreme Court, U.S.
FILED
AUG 14 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

MARIE M. KRIETER, TRUSTEE
Petitioner,

v.

LAWTON CHILES, Governor of the State of Florida; JIM SMITH, Secretary of State; BOB BUTTERWORTH, Attorney General; GERALD LEWIS, Comptroller; TOM GALLAGHER, Treasurer; BOB CRAWFORD, Commissioner of Agriculture; and BETTY CASTOR, Commissioner of Education, constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

ROBERT A. ROUTA
P. O. Drawer 6506
Tallahassee, Florida 32314
904/926-6300

Counsel for Petitioner,
Marie M. Krieter,
Trustee

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

28

QUESTION PRESENTED FOR REVIEW

If the State of Florida dedicates submerged lands offshore the Krieter family's riparian holdings for a state park, can the state thereafter deny the Krieters the right to construct a wharf extending into the Atlantic Ocean, where no environmental harm will result from such construction, without the payment of just compensation for the taking of riparian rights?

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceeding before this Court are:

Petitioner: Marie M. Krieter, Trustee and her successors as Trustee of the Marie M. Krieter Trust, dated November 15, 1989.

Respondent: Lawton Chiles, Governor of the State of Florida; Jim Smith, Secretary of State; Bob Butterworth, Attorney General; Gerald Lewis, Comptroller; Tom Gallagher, Treasurer; Bob Crawford, Commissioner of Agriculture; and Betty Castor, Commissioner of Education, constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida.

Both of the above-named parties were parties to the proceedings below.

TABLE OF CONTENTS

Page

Question Presented for Review i

Parties to Proceedings in Court Below ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 3

Reasons the Writ Should Be Granted 5

Conclusion 10

Certificate of Service 12

Appendix:

APPENDIX A - Order of the Supreme Court of Florida entered on June 24, 1992 . . . . . A-1

APPENDIX B - Order of the Third District Court of Appeal Denying Motion for Rehearing, Certification and for Rehearing En Banc entered on April 14, 1992 . . . . . A-2

TABLE OF CONTENTS (continued)

Page

APPENDIX C - Opinion of the Third District Court of Appeal of the State of Florida entered on February 11, 1992 ..... A-3

APPENDIX D - Order of Dismissal in the Circuit Court of the Sixteenth Judicial Circuit of the State of Florida entered July 19, 1991 ..... A-8

TABLE OF AUTHORITIES

CASES	Page
Hilt v. Webber, 252 Mich.Rpt. 198 (Mich. 1930)	8
Lucas v. South Carolina Coastal Council, ____ S.Ct. ____, 1992 WL 142517 (1992)	7
Marks v. Whitney, 491 P.2d 374 (Cal. 1971)	10
Nugent v. Valone, 161 A.2d 802, 91 RI 145 (RI 1960)	10
State of Florida v. Florida National Properties, Inc., 338 So.2d 13 (Fla. 1976)	7
Town of Orange v. Resnick, 109 Atl. 864, 94 Conn. 573 (Conn. 1920)	7-8
Yates v. Milwaukee, 77 S.Ct. 497 (1870)	5

OTHER AUTHORITIES

Fifth Amendment to the United States Constitution	2,5
Fourteenth Amendment to the United States Constitution	2,5
28 U.S.C. Section 1257(a)	2
28 U.S.C. Section 2101(c)	2
Chapter 253, Florida Statutes (1991)	3

TABLE OF AUTHORITIES (continued)

Page

Section 253.763, Florida Statutes (1991) 3

U.S. Supreme Court Rule 13.4 2

Rule 17-312.060, Florida Administrative Code 4

Rule 18-21.0041, Florida Administrative Code 4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

MARIE M. KRIETER, TRUSTEE
Petitioner,

v.

LAWTON CHILES, Governor of the State of Florida; JIM SMITH, Secretary of State; BOB BUTTERWORTH, Attorney General; GERALD LEWIS, Comptroller; TOM GALLAGHER, Treasurer; BOB CRAWFORD, Commissioner of Agriculture; and BETTY CASTOR, Commissioner of Education, constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

The Petitioner, Marie M. Krieter, Trustee, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the Third District Court of Appeal of Florida entered on February 11, 1992.

OPINIONS BELOW

The order of the Supreme Court of Florida denying the Petition for Review is not reported, but is reprinted as Appendix A. The opinion of the Third District Court of

Appeal of Florida is reported at 595 So.2d 111 (Fla. 3rd DCA 1992), and is reprinted in the Appendix as Appendix C. The order of the Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida is not reported, but is reprinted as Appendix D.

JURISDICTION

This Petition seeks review of an opinion and judgment of the Third District Court of Appeal of Florida for which the Supreme Court of Florida denied a Petition for Review. This Petition is filed within ninety days of the order of the Supreme Court of Florida, pursuant to 28 U.S.C. Section 2101(c), and U.S. Supreme Court Rule 13.4.

The jurisdiction of this Court to review the judgment of the Third District Court of Appeal of Florida is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ...nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF THE CASE

Petitioner Marie M. Krieter, Trustee, on behalf of the Krieter family, filed suit in Monroe County Circuit Court in February 1991. The complaint was brought under the provisions of Section 253.763, Florida Statutes (1991), and a second count brought under the Constitutions of Florida and of the United States, for a taking of private property without compensation. Respondent Board of Trustees moved to dismiss for failure to state a cause of action or in the alternative to strike, and an Order of Dismissal was entered by the Circuit Judge.

On February 11, 1992, the Third District Court of Appeal entered its Opinion affirming the dismissal by the Court below, and on April 14, 1992, the Court denied Petitioner's Motions for Rehearing, Certification, and for Rehearing En Banc.

On April 20, 1992, Petitioner filed a Notice to Invoke Discretionary Jurisdiction in the Supreme Court of Florida. Both Petitioner and Respondent filed briefs concerning jurisdiction, and on June 24, 1992, the Court entered an order denying the Petition for Review.

Marie M. Krieter, Trustee, is the owner and record title holder of Lot 32, Block 1, Amended and Extended Plat of Key Largo Ocean Shores, Plat Book 4, page 18, of the Public Records of Monroe County. Respondent Trustees are the Governor and Cabinet of the State of Florida, sitting as the Board of Trustees of the Internal Improvement Trust Fund, the State agency holding title to the State submerged sovereignty lands, and charged with management of those lands pursuant to Chapter 253, Florida Statutes (1991).

On December 3, 1959, Respondent Trustees dedicated a parcel of submerged lands some three miles offshore Key Largo to the Florida Board of Parks and Historic Memorials for the establishment of the John Pennekamp Coral Reef State Park. On September 21, 1967, the Trustees dedicated the submerged lands between the John Pennekamp Coral Reef State Park and Key Largo for public state park purposes, subject however to any riparian rights and interests which may exist in or affect those lands

Petitioner and her family have been involved in the development and sale of lots and homes in Key Largo Ocean Shores for over twenty years. The property fronts the Atlantic Ocean, with approximately 100 feet of shoreline. Robert C. Krieter resides in a home on the lot and on May 10, 1988, submitted an application to construct a private wharf to the Florida Department of Environmental Regulation. The department determined the proposed work to be exempt from permitting.

Under the provisions of Rule 17-312.060, Florida Administrative Code, the Department of Environmental Regulation sent a copy of the application to Respondent Trustees. The Trustees sent a letter dated September 22, 1988, to Robert Krieter's engineer stating that a letter of consent would be required authorizing construction of the dock. On October 8, 1990, Robert C. Krieter modified the proposed dock application to conform to the Trustees' Florida Keys Marina and Dock Siting Policies at Rule 18-21.0041, Florida Administrative Code. On December 18, 1990, the Trustees denied Robert Krieter's request for consent of use and stated that on April 12, 1990, the Governor and Cabinet adopted a policy that no future authorizations would be issued for the construction of new private docks in John Pennekamp Coral Reef State Park waters.

The trial court's order of dismissal states simply,

> Ordered and Adjudged that Plaintiff does not possess the unqualified right to build a wharf or dock and Defendant's Motion to Dismiss is granted and the Complaint herein is accordingly dismissed.

The constitutional questions were brought in the first instance to the Circuit Court for the Sixteenth Judicial Circuit in and for the State of Florida by way of paragraph 28 of the Complaint, which states:

> 28. The denial of Plaintiff's requested consent of use constitutes a taking of private property without compenation in constravention of Article I, Section 9, and Article IX, Section 6, of the Florida Constitution and Amendments V and XIV of the United States Constitution.

This Court's decision concerning riparian rights was brought to the attention of the Circuit Judge, through Petitioner's Memorandum of Law, with direct citation to the case of *Yates v. Milwaukee*, 77 S.Ct. 497 (1870). The issue of an unconstitutional taking of property was briefed and argued before the Third District Court of Appeal, including the case of *Yates v. Milwaukee*, supra.

REASONS THE WRIT SHOULD BE GRANTED

1. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *YATES V. MILWAUKEE*, 77 S.CT. 497 (1870).

In Yates, the riparian owner constructed a wharf some 190 feet out into the Milwaukee River. Subsequently the Common Council of Milwaukee by ordinance declared

Yates' wharf to be an obstruction to navigation and ordered it to be abated. There was no evidence to show that the wharf was an actual obstruction to navigation, or was in any other sense a nuisance. The Common Council contracted with a third party to remove the wharf and Yates filed for an injunction to restrain the removal of his pier. His suit was dismissed and he appealed to this Court.

This Court stated unequivocally:

> But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be.

Id. at 504.

This Court continued:

> This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.

Id. at 504.

As a result of shallow waters immediately offshore Key Largo, the only navigable access available to the Krieter family is through the construction of a dock. Since the time of earliest settlement of Key Largo, docks have been constructed out into the Atlantic Ocean. Since the time of statehood, the Florida Supreme Court has acknowledged the riparian owner's right to wharf out.

The Trustees' prohibition against dock construction in April 1990 occurred well after the Kreiter family had obtained title to the subject property. As this Court recently stated:

> Where the state seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logical and antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.

Lucas v. South Carolina Coastal Council, ____ S.Ct. ____, 1992 WL 142517 (1992).

In an analogous confrontation regarding the boundary between state-owned water bottoms and uplands of riparian owners, the Florida Supreme Court held that such matters were controlled by ancient common law and by Federal law. *State of Florida v. Florida National Properties, Inc.*, 338 So.2d 13 (Fla. 1976).

II. THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT CONCERNING THIS PARTICULAR QUESTION.

A Connecticut case directly on point is *Town of*

Orange v. Resnick, 109 Atl. 864, 94 Conn. 573 (Conn. 1920), in which a riparian owner attempted to construct a bathing pavilion in front of his upland, stretching over and across the shore between the high and low water mark. However, the State of Connecticut had previously dedicated the land between the high and low water mark in front of the riparian owners' upland to the town of Orange for the purpose of a public park. The town brought suit against the riparian owner to restrain an encroachment on the land of the town. In comparing the right to build a bathing pavilion with the accepted riparian right to wharf out, the court found that the privilege to develop the shore in this way "...may constitute a large part of the value of the adjoining upland and that when this is done without obstruction of the navigation, it is a legitimate use of the owners advantages." *Id.* at 866.

Having thus decided that building the pavilion was a lawful exercise of riparian rights, the court then faced the second part of its analysis in determining if due compensation was required. The court answered this question in the affirmative and held:

> The riparian rights of the owner of adjoining upland clearly constitute interest in property. This being so, it must follow that the taking of the soil between the high and low water mark for the purposes of converting it into...a public park, is as against abutting riparian owners a taking of private property for public use.

Id. at 866, 867.

The Supreme Court of Michigan reached a similar result in *Hilt v. Webber*, 252 Mich.Rpt. 198 (Mich. 1930):

> Generally speaking riparian rights are:
> (1) Use of the water for general purposes, as bathing, domestic use, etc. (2) To wharf out to navigability (3) Access to navigable waters. 27 R.C.L. pp. 1070, 1375; 45 C.J. p. 491; Black's Pomeroy on Water Rights, p.517.

Id. at 225.

In a concurring opinion, Judge Potter states:

> Whether the title to the lands between the water's edge at high-water mark and low-water mark is in the riparian proprietor or in the State for the use and benefit of the public, including the riparian proprietor, is not important. If the title is in the State it holds it as a mere naked trustee subject to the right of access, to wharf and dock out, the right of bathing, the right to use, for domestic and agricultural purposes, the waters of the lake, and subject to all other rights of the riparian proprietor. The State has no power to divest itself of this trust. It may not sell and convey title to this land, interfere with the riparian proprietor's rights or the beneficial use thereof by such riparian proprietor, *constitute such lands a public park*, preventing the riparian proprietor from operating mines, pits, or quarries thereon, or exercise dominion and control over it to the exclusion of the riparian proprietor, or in interference with his rights, without condemnation of the rights of the riparian proprietor and the payment of just compensation therefore.
> (emphasis supplied.)

Id. at 228.

Rhode Island courts addressed the issue, and in *Nugent v. Vallone*, 161 A.2d 802, 91 RI 145 (RI. 1960), the Supreme Court held:

> Indeed it appears to have been long recognized in this state that this right to wharf out is a common law right, which in the absence of a statute to the contrary will not be denied, provided that the exercise thereof does not interfere with navigation or the rights of other riparian proprietors.

Id. at 805.

An extensive discourse is found contrasting riparian rights with the public trust doctrine under the laws of the State of California in the case of *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971), in which the court relates:

> A littoral owner has been held to have the right to build a pier out to the line of navigability.

Id. at 382.

The courts of the State of Florida have only recently equated the ownership of submerged lands with riparian rights, and for the first time have departed from a long progression of cases affirming the riparian owner's right to wharf out.

CONCLUSION

Wave after wave of environmental regulation have crested upon the interests of private property owners throughout the State of Florida and across the United States. The opinion by the Third District Court of Appeal of Florida is the first reported opinion holding that a

riparian property owner does not have the right to wharf out. There is no question but that the right is subject to regulation by the police power. However, that is not Marie Krieter's case. A park was created offshore her lands and solely as a result of the creation of that park, her riparian rights were taken for public purposes without compensation. Private property rights are becoming endangered species. The snail darter and the Key Largo wood rat have had their day in court and at this point Marie Krieter is simply asking that she and her family have their day, and be provided an opportunity to prove their claim. Marie Krieter asks this Court assume jurisdiction, reverse the decisions below and send the case back to Monroe County for trial.

Respectfully submitted,

ROBERT A. ROUTA
Post Office Drawer 6506
Tallahassee, FL 32314
904/926-6300

Attorney for Petitioner
Marie M. Krieter,
Trustee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Petition for Writ of Certiorari have been served this ____ day of _____, 1992 by U.S. Mail upon John Costigan, Esq., Department of Natural Resources, 3900 Commonwealth Blvd., Tallahassee, Florida 32399.

_____

Robert A. Routa

APPENDIX A

SUPREME COURT OF FLORIDA

Maria M. KRIETER, etc.,
Petitioner,

V.

Lawton CHILES, etc., et al.,
Respondent.

Nos. 79,746, 91-2145.

District Court of Appeals,
Third District.

June 24, 1992.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

MCDONALD, Acting C.J., BARKETT, GRIMES, KOGAN and HARDING, JJ., concur.

cc. Hon. Louis J. Spallone, Clerk
Hon. Danny L. Kolhage, Clerk
Hon. J. Jefferson Overby, Judge

Robert A. Routa, Esquire
John W. Costigan, Esquire

APPENDIX B

Marie M. KRIETER, Trustee,

Appellant,

V.

Lawton CHILES, Governor of the State of Florida, et al.,

Appellees.

No. 91-2145.

District Court of Appeal
Third District.

April 14, 1992

Upon consideration, appellant's motions for rehearing, certification and for rehearing en banc are hereby denied. Florida Audubon Society's motion for reconsideration is denied.

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

cc: Robert A. Routa
John W. Costigan
Joseph Z. Fleming

APPENDIX C

Maria M. KRIETER, Trustee

Appellant,

v.

LAWTON CHILES, Governor of the State of Florida; JIM SMITH, Secretary of State; BOB BUTTERWORTH, Attorney General; GERALD LEWIS, Comptroller; TOM GALLAGHER, Treasurer; BOB CRAWFORD, Commissioner of Agriculture; and BETTY CASTOR, Commissioner of Education, constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,

Appellees.

N. 91-2145

District Court of Appeal
Third District.

January Term, 1992

Opinion filed February 11, 1992.

An Appeal from the Circuit Court of Monroe County, J. Jefferson Overby, Judge.

Robert A. Routa, for appellant.

John W. Costigan, for appellee.

Before BASKIN, JORGENSON, and LEVY, JJ.

LEVY, Judge.

This case involves a dispute over the construction of a private dock on submerged land held in title by the State of Florida in its sovereignty. The parties do not dispute that title to the submerged land in question is held by the state. This submerged tidal land is held in trust, by the Trustees, for the people of the state.[1] *Hayes v. Bowman*, 91 So.2d 795 (Fla. 1957). When Florida became a state in 1845, it took title to those submerged lands to hold in trust for the use and benefit of all the people of Florida. *See, e.g., Broward v. Mabry*, 58 Fla. 398, 50 So.826 (1909). In more recent times, the common law Public Trust Doctrine was codified in Article X, Section 11 of the Florida Constitution. This provision states that:

> [t]he title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest.

Fla. Const. art. X, Section 11.

In 1967, Pennekamp Park was expanded to include the submerged land between its 1959 offshore boundary and Key Largo. This expanded territory of Pennekamp Park, like that of the older boundaries of Pennekamp Park, has always been held in title by the state in its sovereignty. This expansion of the state-created park into what is already sovereign submerged land does not change the situation that the submerged land in question has always been held in trust by the Trustees for the people of this state.

---

[1] For a historical analysis of the Public Trust Doctrine's common law development in Florida, see State v. Black River Phosphate, Co., 32 Fla. 82, 13 So. 640 (1893); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909); Hayes v. Bowman, 91 So.2d 795 (Fla. 1957).

Marie M. Krieter is a trustee of the Marie M. Krieter Trust, which was created on November 15, 1989. As trustee, Krieter owns property ["Upland Property"] on Key Largo that fronts the Atlantic Ocean. The property contains 100 feet of ocean frontage. Approximately 220 yards from the Atlantic Ocean is an access road to the property. A resident of the upland property, Robert Krieter, submitted an application, on May 19, 1988, to the Florida Department of Environmental Regulation ["D.E.R."] for the construction of a private single family dock on the property. D.E.R. reviewed the application and forwarded it to the Trustees as required by Rule 17-312.060, Florida Administrative Code.

In their letter dated December 18, 1990, the Trustees denied Krieter's request for consent of use. The Trustees stated that they adopted a policy, on April 12, 1990, that no future authorizations would be granted to construct any new private docks in the waters of Pennekamp Park. Marie Krieter brought suit, as trustee of the Marie M. Krieter Trust, against the Trustees and alleged a taking of private property without compensation. The appellant's allegations were brought under the provisions of Section 253.763, Florida Statutes (1989), and the Constitutions of the United States and the State of Florida. The Trustees moved to dismiss the complaint for failure to state a cause of action. In its July 19, 1991, Order of Dismissal, the trial court dismissed the action giving the appellant 20 days to file an amended complaint. The appellant did not file an amended complaint and the trial court entered its Final Order of Dismissal, with prejudice, on August 19, 1991.

The appellant's upland property carries with it certain riparian rights. *Game and Fresh Water Fish Commission v. Lake Islands, Ltd.*, 407 So.2d 189, 191 (Fla. 1981). Although the riparian right of ingress and egress is an

appurtenance to the ownership of private upland property, *Hayes*, 91 So.2d at 799, it is a qualified right which must give way to the rights of the state's people. *Game and Fresh Water Fish Commission*, 407 So.2d at 191 (*quoting Ferry Pass Inspectors; & Shipper's Ass'n v. White's River Inspectors' & Shippers' Ass'n.*, 57 Fla. 399, 48 So. 643 (1909)). As a riparian owner, the appellant argues that the expansion of Pennekamp Park, and the Trustees' subsequent denial of her request for a consent of use to build a dock, denies her the right of ingress and egress, by wharfing out, from her upland property. The appellant argues this a taking by the state for which she is entitled to compensation. We disagree.

Among other principles, the Public Trust Doctrine dictates that there be some impairment of the citizen's right to enjoy absolute freedom before allowing a citizen the use of public submerged land. *Game and Fresh Water Fish Commission*, 407 So.2d 189; *Sarasota County Anglers Club, Inc. v. Burns*, 193 So.2d 691 (Fla. 1st DCA 1967). The appellant made no showing in the record of necessity or that ingress or egress to her property by means of water is the only method thereof. As she alleged in her complaint, her property is bounded on one side by a public road on which she can travel to and from her property. Ingress and egress by water, therefore, is not a necessity for which the appellant may claim a right superior to that of the public.

As a riparian owner, the appellant has no title, of any nature, to the sovereign lands that are held in trust by the Trustees for the people of Florida. *Graham v. Edwards*, 472 So.2d 803, 806 (3d DCA 1985), *rev. denied* 482 So.2d 348 (Fla. 1986). The Trustees have the authority to preclude the construction of private docks when it is in the Public interest to do so. *Graham*, 472 So.2d at 807. This case is not a question of an expanding state marine park that

encroaches upon the rights of a riparian owner. The appellant's riparian rights were subject to the state's ownership of the sovereign submerged lands long before Pennekamp Park was expanded to the shores of Key Largo. The appellant does not have the right to wharf out for purposes of ingress and egress. Ingress and egress is available from the property by land-based routes. Only in the absence of this modern-day alternative could the appellant argue a necessity of ingress and egress. In the absence of such a necessity, the appellant's riparian rights are subject to the public's interests.

Affirmed.

APPENDIX D

Marie M. KRIETER, Trustee,
Plaintiff,

v.

LAWTON CHILES, Governor of the State of Florida; JIM SMITH, Secretary of State; BOB BUTTERWORTH, Attorney General; GERALD LEWIS, Comptroller; TOM GALLAGHER, Treasurer; BOB CRAWFORD, Commissioner of Agriculture; and BETTY CASTOR, Commissioner of Education, constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,
Defendant.

No. 91-20065-CA-18.

Circuit Court, Sixteenth
Judicial Circuit, Monroe County.

July 19, 1991.

ORDER OF DISMISSAL

THIS MATTER having come before the Court on May 15, 1991 on the Motion of Defendant to Dismiss or in the alternative to Strike, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Plaintiff does not possess the unqualified right to build a wharf or dock, and Defendants' Motion to Dismiss is granted and the Complaint herein is accordingly dismissed. It is further

ORDERED AND ADJUDGED that Plaintiff shall have twenty (20) days from the date of this Order within which to file amended or further pleadings as Plaintiff deems appropriate.

DONE AND ORDERED in chambers this 19 day of July, 1991.

/s/ J. Jefferson Overby
Circuit Judge

Copies furnished to:

Robert A. Routa
Post Office Drawer 6506
Tallahassee, Florida 32314-6506
Attorney for Plaintiff

John W. Costigan
Asst. General Counsel
Department of Natural Resources
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399
Attorney for Defendants

Supreme Court, U.S.
FILED
SEP 16 1992
OFFICE OF THE CLERK

No. 92-276

In The

Supreme Court of the United States

October Term, 1992

MARIE M. KRIETER, TRUSTEE,

Petitioner,

vs.

LAWTON CHILES, Governor of the State of Florida; JIM SMITH, Secretary of State; BOB BUTTERWORTH; Attorney General; GERALD LEWIS, Comptroller; TOM GALLAGHER, Treasurer; BOB CRAWFORD, Commissioner of Agriculture; and BETTY CASTOR, Commissioner of Education, constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,

Respondent.

On Petition for Writ of Certiorari to the Third District Court of Appeal for Florida

RESPONDENT'S BRIEF IN OPPOSITION

JOHN W. COSTIGAN
Counsel of Record
LANETTE M. PRICE
Attorneys for Respondent
Department of Natural Resources
3900 Commonwealth Boulevard
Douglas Building - MS 35
Tallahassee, Florida 32399
(904) 488-9314

2679
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED

Whether, under the circumstances in this case, the riparian owner's request to construct a wharf on sovereign submerged lands within a state park is subject to the public's interest pursuant to the Public Trust Doctrine?

PARTIES TO THE PROCEEDING

The Petitioner's description of the parties below is essentially correct. In addition, on January 22, 1992, the Florida Audubon Society filed with the Third District Court of Appeal of Florida its ". . .Motion For Leave To Participate As An Amicus Curiae" in support of Respondent. That motion was denied as moot on March 11, 1992, subsequent to the court's opinion of February 11, 1992.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	2
Statement of Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Denying the Writ	4
I. The decision below is entirely consistent with this Court's decision in *Yates v. City of Milwaukee*, 77 S. Ct. 497 (1870).	4
II. The decision of the Third District Court of Appeal of Florida is not in conflict with the decisions of other state courts of last resort concerning this particular question.	10
A. Other State Courts	10
B. Florida Courts	13
Conclusion	15

Citations

Page

TABLE OF CITATIONS

Cases Cited:

Adams v. Elliott, 174 So. 781 (Fla. 1937) 14

Arkansas v. Tennessee, 246 U.S. 158 (1918) 11

Barney v. Keokuk, 94 U.S. 324 (1877) 11

Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) 11

Dutton v. Strong, 66 U.S. 23 (1861) 4, 11

Ferry Pass Inspectors and Shippers Association v. White's River Inspectors and Shippers Association, 48 So. 643 (Fla. 1909) 14

Hardin v. Jordan, 140 U.S. 371 (1891) 11

Hilt v. Weber, 252 Mich. 198 (1930) 12

Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) 8

Marks v. Whitney, 491 P.2d 374 (Cal. 1971) 12

Nugent v. Vallone, 161 A.2d 802 (R.I. 1960) 12

Scranton v. Wheeler, 179 U.S. 141 (1900) 5, 6, 7, 8

Shively v. Bowlby, 152 U.S. 1 (1893) 11

Citations

Page

St. Paul & P.R. Co. v. Schurmeier, 74 U.S. 272 (1868) 11

State of Florida v. Florida National Properties, Inc., 338 So. 2d 13 (Fla. 1976) 9

Thiesen v. Gulf, Florida and Alabama Railway, 78 So. 491 (Fla. 1917) 9, 10, 14

Town of Orange v. Resnick, 109 Atl. 864 (Conn. 1920) 12

United States v. River Rouge Improv. Co., 269 U.S. 410 (1975) 4, 5

Weber v. State Harbor Commissioners, 85 U.S. 57 (1873) 4

Williams v. Guthrie, 137 So. 682 (Fla. 1931) 14

Yates v. City of Milwaukee, 77 S. Ct. 497 (1870)..... .....4, 5, 6, 7, 8, 9, 10, 11, 12

Statute Cited:

28 U.S.C. § 1257(a) 2

Rule Cited:

United States Supreme Court Rule 15.2 2

No. 92-276

In The

Supreme Court of the United States

October Term, 1992

MARIE M. KRIETER, TRUSTEE,

Petitioner,

vs.

LAWTON CHILES, Governor of the State of Florida; JIM SMITH, Secretary of State; BOB BUTTERWORTH, Attorney General; GERALD LEWIS, Comptroller; TOM GALLAGHER, Treasurer; BOB CRAWFORD, Commissioner of Agriculture; and BETTY CASTOR, Commissioner of Education, constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,

Respondent.

On Petition for Writ of Certiorari to the Third District Court of Appeal for Florida

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Lawton Chiles, Governor of the State of Florida; Jim Smith, Secretary of State; Bob Butterworth, Attorney General; Gerald Lewis, Comptroller; Tom Gallagher, Treasurer; Bob Crawford, Commissioner of Agriculture; and Betty Castor, Commissioner of Education, constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, urges

the Court to deny the petition for writ of certiorari to review the judgment and opinion of the Third District Court of Appeal of Florida entered on February 11, 1992.

OPINIONS BELOW

The order of the Supreme Court of Florida denying the petition for review has not been reported, but is reprinted as Petitioner's Appendix A. The opinion of the Third District Court of Appeal of Florida is reported at 595 So.2d 111 (Fla. 3rd DCA 1992), and is reprinted as Petitioner's Appendix C. The order of the Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida has not been reported, but is reprinted as Petitioner's Appendix D.

STATEMENT OF JURISDICTION

The Respondent's brief in opposition is filed within thirty days after receipt of the petition for writ of certiorari pursuant to United States Supreme Court Rule 15.2.

The Court's jurisdiction has been invoked by the Petitioner pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved have been adequately set forth in the petition for writ of certiorari filed by the Petitioner.

STATEMENT OF THE CASE

Petitioner's Statement of the Case necessitates the following corrections and clarifications.

At the trial court level, this matter proceeded no further than

the pleading stage. Respondent's motion to dismiss (for failure to state a cause of action) addressed the contention in the complaint that Petitioner Marie M. Krieter possessed an absolute riparian right to construct a dock on sovereign submerged land. The trial court disagreed and held that ". . . Plaintiff does not possess the unqualified right to build a wharf or dock." Further, the trial court granted Petitioner twenty (20) days within which to amend her pleadings. Petitioner declined to amend, and on August 19, 1991 the trial court entered its final order of dismissal.

Because no evidence or testimony was ever submitted at the trial court level, the "facts" submitted by Petitioner are not facts at all; rather, most are restated allegations from the complaint, some are new allegations raised for the first time in the petition before this Court, and others are incomplete in their restatement. Because a complaint attacked for insufficiency is generally regarded in the light most favorable to the plaintiff, these discrepancies are for the most part of no consequence to the issue before this Court. However, Respondent's written denial of consent to build a dock dated December 18, 1990, contained the following second basis for denial not noted in Petitioner's Statement of the Case: a duly enacted rule of the Division of Recreation and Parks of the Department of Natural Resources of the State of Florida which prohibited construction within the boundaries of John Pennekamp Coral Reef State Park.

Respondent has also restated the Question Presented For Review submitted by Petitioner, partially to more accurately reflect the proceedings below and the question before this Court, and further, to eliminate the representation therein that no environmental harm would result from construction of the dock, a contention neither germane to these proceedings nor founded in fact.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN *YATES V. CITY OF MILWAUKEE*, 77 S.CT. 497 (1870).

Petitioner contends that the opinion of the Third District Court of Appeal of Florida is in direct conflict with this Court's opinion in *Yates v. City of Milwaukee*, 77 S. Ct. 497 (1870). Petitioner first relies upon the following portion of *Yates*:

> But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, *subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the* public, whatever those may be.

Id. at 504 (emphasis added).

As evident in the above-quoted language, and in a line of opinions both antecedent and subsequent to *Yates*, the Court has consistently recognized the qualified nature of the riparian privilege to wharf out. *See, e.g., Dutton v. Strong*, 66 U.S. 2 (1861); *Weber v. State Harbor Commissioners*, 85 U.S. 57 (1873); and, *United States v. River Rouge Improv. Co.*, 269 U.S. 410 (1975). In *River Rouge*, the Court found that the right of access

remains in the riparian owner *until taken away by the government in the due exercise of its powers. River Rouge*, 369 U.S. at 420. The Court further explained its position as follows:

> It is well settled that in the absence of a controlling local law otherwise limiting the rights of a riparian owner upon a navigable right he has, in addition to the rights common to the public, a property right incident to the ownership of the bank, of access from the front of his land to the navigable part of the stream, *and when not forbidden by public law* may construct landings, wharves or piers for this purpose.

Id. at 418 (emphasis added).

Consonant with *Yates*, the opinions of the Court referenced above, and the Public Trust Doctrine, the Third District Court of Appeal of Florida found the Petitioner's privilege to wharf out to be subject to rules duly imposed by the state of Florida for the protection of the rights of the public.

As further confirmation of the consistency of the decision below with *Yates*, the Court's position on this issue was further elucidated in the case of *Scranton v. Wheeler*, 179 U.S. 141 (1900). In *Scranton*, the Court addressed whether a taking had occurred where a riparian owner's access from his land to navigability was lost because the United States had constructed a pier resting in front of the owner's upland for the purpose of improving navigation. The plaintiff argued that he was entitled to compensation pursuant to *Yates*. *Id.* at 157. However, the Court found that *Yates* was inapplicable and distinguished *Yates* as follows:

> That, as we have seen, was a case in which the riparian owner had in conformity with law erected a wharf in front of his upland in order to have access to navigable water. The city of Milwaukee attempted arbitrarily and capriciously to destroy or remove the wharf that had lawfully come into existence and was not shown, in any appropriate mode, to have been an obstruction to navigation. It was a case in which a municipal corporation intended the actual destruction of tangible property belonging to a riparian owner and lawfully used by him in reaching navigable water, and not, like this, a case of the exercise in a proper manner of an admitted governmental power resulting indirectly or incidentally in the loss of the citizen's right of access to navigation, a right never exercised by him in the construction of a wharf before the improvement in question was made by the government.

Id. at 158. *Yates* can be similarly distinguished from the facts in the case at bar.

Additionally, in *Scranton*, the Court explicitly set forth its position regarding alleged riparian rights in state-owned submerged lands:

> Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water.

> It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.

Id. at 163.

The Petitioner next relies upon the following portion of *Yates:*

> This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.

Yates, 77 S. Ct. at 504. Again, the opinion of the Third District Court of Appeal of Florida on this issue is consistent with *Yates*, as evidenced by the following portion of this Court's opinion in *Scranton:*

> If the riparian owner cannot enjoy access to navigability and if such right of access ceases alone for that reason to be of value, there is not, within the meaning of the Constitution a taking of private property for public use, but only a consequential injury to a right which must be enjoyed, as was said in the *Yates* case "in due subjection to the rights of the public," — *an injury resulting incidentally from the*

> *exercise of a governmental power for the benefit of the general public and from which no duty arises to make or secure compensation to the riparian owner.*

Id. at 164 (emphasis added). In *Scranton*, the Court found that the government action was not arbitrary and capricious and no compensation was due the riparian owner. *Id.* Similarly, in the case below, the state's denial of Petitioner's qualified privilege to wharf out resulted incidentally from the exercise of the state's power to act for the benefit of the general public and no duty to provide compensation arose therein.

Petitioner's argument is essentially that she has the unfettered right to sink pilings in the public's land and to construct a dock over the public's land regardless of the public trust and the superior rights of the public thereunder. However, under the circumstances herein, the Trustees correctly did not consent to the use of the public's property for a private dock. The opinion of the Third District Court of Appeal of Florida is entirely in harmony with *Yates* in finding that Petitioner's qualified privilege to wharf out was subservient to the public's interests pursuant to the Public Trust Doctrine.

The Petitioner cites as further authority this Court's recent opinion in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). However, the Petitioner has never argued, as was argued in *Lucas*, that she was deprived of all economically beneficial use of her property. The state has never required that Petitioner leave her property "economically idle." Rather, the Petitioner's position has always been that she was deprived of her alleged unqualified right to wharf out and she has not argued that the Respondent has in any other way interfered with her riparian or property rights. The Court's decision in *Lucas* is thus inapplicable to this matter.

Petitioner also references the case of *State of Florida v. Florida National Properties, Inc.*, 338 So. 2d 13 (Fla. 1976). The Petitioner is incorrect in stating that in *Florida National Properties* the Florida Supreme Court held that the matters therein were controlled by ancient common law and Federal law. Rather, the trial court stated that the matters were governed by federal law, *id.* at 17, while the Florida Supreme Court stated that ancient common law prevailed. *Id.* at 18.

The Petitioner's implication that the state of Florida has ignored this Court's decision in *Yates* is clearly untrue. The *Yates* decision was considered long ago by the Florida Supreme Court in the case of *Thiesen v. Gulf, Florida and Alabama Railway*, 78 So. 491 (Fla. 1917).

In *Thiesen*, the defendant railroad began filling and laying tracks waterward of Thiesen's adjoining riparian property. Thiesen filed suit and complained that he enjoyed a common law right to ingress and egress and also enjoyed the right to construct and maintain wharfs, piers, docks and bath houses on the water. The court conceded that the right of ingress and egress was a common law riparian right, together with an unobstructed view over the water, and in common with the public the right of navigating, bathing and fishing. *Id.* at 501. However, the court severely questioned Thiesen's contention that as a riparian owner he also had the right to build and maintain wharfs, piers and bath houses. *Id.* The court embarked upon a discussion designed to analyze this question and in so doing referred to *Yates*. The *Thiesen* court stated:

> But that *case [Yates] does not recognize the right of the riparian owner to build wharfs beyond the low water mark to the channel.* In the case of *Saint Anthony Falls Water Power Co. v. Saint Paul Water Commissioners*, 168 U.S. 349, 18 Sup. Ct. 157, 42 L.Ed. 497, the

> court was of the opinion that the *property rights of a riparian owner of land on navigable waters are to be measured by the rules and decisions of the state within whose boundaries the particular land lies.*

Id. at 502 (emphasis added).

The *Thiesen* court consulted numerous opinions of this Court subsequent to *Yates* and confirmed that *Yates* was not only inapplicable to the matter, but that it was the right of each state to determine the extent of the title and rights of riparian owners within that state. *Id.*

The opinion of the Third District Court of Appeal was a well-reasoned decision resulting in a holding consonant with the opinions of this Court and of the courts of Florida.

II.

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT CONCERNING THIS PARTICULAR QUESTION.

A. Other State Courts

The Petitioner contends that it is relevant to this Court's determination whether the decision below conflicts with the outcome of the decisions of other state courts on this particular question. However, in numerous cases, this Court has consistently stated that it adheres to the principle that "[i]t is for the states to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders

and the riparian lands adjacent to them." *Arkansas v. Tennessee*, 246 U.S. 158, 175 (1918). "The title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several states, subject to the rights granted to the United States by the Constitution." *Shively v. Bowlby*, 152 U.S. 1 (1893); *see also, St. Paul & P.R. Co. v. Schurmeier*, 74 U.S. 272 (1868); *Barney v. Keokuk*, 94 U.S. 324 (1877); *Hardin v. Jordan*, 140 U.S. 371 (1891); and *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).

In *Shively* the Court reviewed a quiet title action in Oregon. After summarizing the laws of the original states regarding the scope of public and private rights in lands below the high water mark of navigable waters, the Court noted that:

> [T]here is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one state to cases arising in another.

Shively, 152 U.S. at 26. Citing its decisions in *Dutton, Schurmeier* and *Yates*, the Court stated that it distinctly recognized the diversity of laws and usages in the different states upon this subject and that "different states adopted different regulations upon the subject." *Id.* at 36. The Court found that none of the three cases called for the laying down or defining of any general rule independent of local law or usage or of the particular facts before the court. *Id.* at 37.

In each of the cases cited by Petitioner, the courts noted the distinctive nature of its state's law regarding riparian rights. In *Town of Orange v. Resnick*, 109 Atl. 864 (Conn. 1920), the Connecticut Supreme Court stated, "it may be that our law as to the private rights of riparian owners is more liberal than that of some other jurisdictions." *Id.* at 866. The court again noted the distinctive nature of Connecticut's law, "[t]hus the exclusive franchise of reclamation and of wharfing out is merely a mode of exercising the right of access, and in this state at least no distinction can be drawn between them." *Id.* at 867.

In *Hilt v. Weber*, 252 Mich. 198 (1930), the Michigan Supreme Court re-examined two previous Michigan decisions in order to clarify the respective rights of the state and of riparian owners pursuant to established rules of property under Michigan law.

In *Nugent v. Vallone*, 161 A.2d 802 (R.I. 1960), the New Jersey Supreme Court recognized that the law "in this state [is] that this right to wharf out is a common-law right." *Id.* at 805. The court went on to cite *Yates* that riparian rights are "subject to such general rules and regulations as the legislature may see proper to impose." *Id.* citing *Yates v. Milwaukee*, 77 U.S. 497, 504 (1870). However, in *Nugent*, unlike the instant case, the court noted that the New Jersey Legislature had not imposed any rules or regulations which prevented construction of the subject pier and were not contesting construction of the pier.

In *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971), the California Supreme Court also relied upon *Yates* that riparian rights must be enjoyed "in due subjection to the rights of the public" and noted California law upholding this principle. Further, the court cited the law of California that "this littoral right is of course burdened with a servitude in favor of the state in the exercise of its trust powers over navigable waters." *Id.* at 382. However, in *Marks*, unlike the present case, California had not exercised this right.

B. Florida Courts

While the laws of the several states may vary on the question at issue, the only discussion of state law relevant to the question herein is the law of Florida. Although the result below may differ from the result which would have been reached by another state court, this does not create a conflict subject to review by this Court. As previously noted, the Court has consistently found that the issue herein is a matter of state choice. The Third District Court of Appeal's decision is consistent with Florida law and does not constitute a constitutional deprivation of Petitioner's rights.

In her petition, Petitioner made the following comments:

> Since the time of statehood, the Florida Supreme Court has acknowledged the riparian owner's right to wharf out.

(Petition at p. 7).

> The courts of the State of Florida have only recently equated the ownership of submerged lands with riparian rights, and for the first time have departed from a long progression of cases affirming the riparian owner's right to wharf out.

(Petition at p. 10). Petitioner has failed to cite any Florida cases to support these assertions and is unable to do so because the assertions are untrue. The decision of the Third District Court of Appeal does not constitute a departure from Florida case law but rather constitutes the continuation of a long progression of Florida cases which have affirmed that riparian owners possess the *qualified privilege* to wharf out.

In accordance with prior decisions of the Florida Supreme Court, the Third District Court of Appeal recognized that the Petitioner did not possess the unqualified right to build a wharf or dock on public land. As illustrated by the following cases, the Florida Supreme Court has consistently held that consent to the private use of public land is controlled by the Public Trust Doctrine and the constitutional mandate that such use not be contrary to the public interest. *See, e.g., Ferry Pass Inspectors and Shippers Association v. White's River Inspectors and Shippers Assoc.*, 48 So. 643 (Fla. 1909) (the Florida Supreme Court recognized that the riparian right to erect bath houses, wharves or other structures is a "privilege" subject to the superior rights of the public); *Thiesen v. Gulf, Florida and Alabama Railway*, 78 So. 491 (1917)(the Florida Supreme Court found that construction of a dock was merely a privilege exercised by riparian owners subject to acquiescence of the state); *Williams v. Guthrie*, 137 So. 682 (Fla. 1931)(the Florida Supreme Court noted that riparian owners have the right to construct wharfs from the upland to reach the navigable water when not objected to by the sovereign or specially forbidden by statute); *Adams v. Elliott*, 174 So. 781 (Fla. 1937) (the Florida Supreme Court stated that riparian owners may construct wharves for authorized purposes, as authorized by law, and that littoral rights and riparian rights are subject to lawful regulation by the state).

Consistent with Florida law and in furtherance of their fiduciary duty pursuant to the Public Trust Doctrine, the Respondent properly refused to allow Petitioner to conduct activities on sovereign submerged lands which were contrary to the public interest.

CONCLUSION

The Court has consistently found that the unfettered private use of public land is not an absolute right, but is a privilege subject to the public interest as determined according to the law of each state. The Third District Court of Appeal of Florida correctly ruled that the Petitioner does not enjoy the unqualified right to build a dock on sovereign land and that Petitioner's riparian rights are subject to the public's interest. The Respondent asks that the Court not assume jurisdiction of this matter.

Respectfully submitted,

JOHN W. COSTIGAN
Counsel of Record
LANETTE M. PRICE
Attorneys for Respondent
Department of Natural Resources
3900 Commonwealth Blvd.
Douglas Building - MS 35
Tallahassee, FL 32399

Supreme Court, U.S.
FILED
SEP 30 1992
OFFICE OF THE CLERK

NO. 92-276

In the Supreme Court of the United States

OCTBER TERM, 1992

MARIE M. KRIETER, TRUSTEE
Petitioner,

v.

LAWTON CHILES, Governor of the State of Florida; JIM SMITH, Secretary of State; BOB BUTTERWORTH, Attorney General; GERALD LEWIS, Comptroller; TOM GALLAGHER, Treasurer; BOB CRAWFORD, Commissioner of Agriculture; and BETTY CASTOR, Commissioner of Education, constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

REPLY TO BRIEF IN OPPOSITION

ROBERT A. ROUTA
P. O. Drawer 6506
Tallahassee, Florida 32314
904/926-6300

Counsel for Petitioner,
Marie M. Krieter
Trustee

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED FOR REVIEW

If the State of Florida dedicates submerged lands offshore the Krieter family's riparian holdings for a state park, can the state thereafter deny the Krieters the right to construct a wharf extending into the Atlantic Ocean, where no environmental harm will result from such construction, without the payment of just compensation for the taking of riparian rights?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Authorities iii

Reasons the Writ Should Be Granted 1

Conclusion 5

Certificate of Service 6

TABLE OF AUTHORITIES

CASES: ..... Page

Belvedere Development Corporation v. Department of Transportation, 413 So.2d 847 (Fla. 4th DCA 1982) 2

Belvedere Development Corporation v. Department of Transportation, 476 So.2d 649 (Fla. 1985) 3

Connolly v. Sebeco, Inc., 89 So.2d 482 (Fla. 1956) 1

Corn v. City of Lauderdale Lakes, 816 F.2d 1514 (11th Cir. 1987) 4

Hayes v. Bowman, 91 So.2d 795 (Fla. 1957) 3

Hishon v. King and Spalding, 467 U.S. 69, 104 S.Ct. 229, 82 L.Ed.2d 59 (1984) 1

Temples v. Florida Industrial Construction Company, Inc., 310 So.2d 326 (Fla. 2d DCA 1975) 1

OTHER AUTHORITIES

Rule 16D-2011, Florida Administrative Code Annotated 2

REASONS THE WRIT SHOULD BE GRANTED

THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT CONCERNING THIS PARTICULAR QUESTION.

It is unfortunate that Marie Krieter must argue first year appellate law to this Honorable Court. However, the Trustees' allegations in their Statement of the Case require reply. For the purpose of passing upon a motion to dismiss a complaint, the court must assume all facts alleged in the complaint to be true. *Connolly v. Sebeco, Inc.* 89 So.2d 482 (Fla. 1956). This Court has held that a motion to dismiss may be upheld only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. *Hishon v. King and Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). Under Florida law, on a motion to dismiss, the movant admits as true all the material facts well-pleaded. *Temples v. Florida Industrial Construction Company, Inc.*, 310 So.2d 326 (Fla. 2d DCA 1975).

As is well known to the Trustees, paragraph twenty of Marie Krieter's complaint states:

> The denial of the requested consent of use is solely for the public benefit and no harm to the public could result from authorization of the consent of use.

Each and every fact contained in Marie Krieter's Statement of the Case was lifted directly from the Complaint, including the fact that no harm, environmental or otherwise, to the public could result from the authorization. Such fact

is germane to whether the denial of authorization to construct the wharf was a valid exercise of the police power, or was the confiscation of private property for a public park.

The attempt by the Trustees to canonize a rule of the Division of Recreation and Parks must be deflected. The park rule referenced by the Trustees without citation is found at 16D-2.011, Florida Administrative Code Annotated, and the annotation to the rule shows that it was in place by October 20, 1972. It was not until the Trustees changed their policy simply by vote on April 12, 1990, that wharves could no longer be constructed offshore riparian lands into the waters of the park. The rule in no way can be considered a statute or a public law.

The Trustees cite extensively to Florida cases in an aberrant attempt to show that Florida property law relating to riparian rights is different from that of the other states that have addressed the issue. Nothing could be further from the truth. The Florida cases cited by the Trustees all confirm the existence of the riparian right to wharf out. In addition to the cases cited by the Trustees, recent Florida case law points out that riparian rights are property.

In 1982, the Fourth District Court of Appeal certified to the Supreme Court of Florida the question:

> [d]oes Florida law permit riparian (or littoral) rights to be separated from riparian lands?

Belvedere Development Corporation v. Department of Transportation, 413 So.2d 847 (Fla. 4th DCA 1982). The Florida Supreme Court responded by stating:

> [f]or this reason we will not hold that riparian

> rights are never severable from the riparian lands; however, we must conclude that the act of condemning petitioner's land without compensating them for their riparian property rights under these facts was an unconstitutional taking.

Belvedere Development Corporation v. Department of Transportation, 476 So.2d 649 (Fla. 1985).

The Florida Supreme Court then went on to discuss what those riparian rights were, and the Court quoted with approval from the concurring opinion by Judge Hersey that:

> [Riparian] rights basically include (1) general use of the water adjacent to the property; (2) to wharf out to navigability; (3) to have access to navigable waters; and (4) the right to accretions.

Id. at 651.

In the case at bar, the Third District Court of Appeal's reliance on the fact that the submerged lands offshore Krieter's property are owned by the State to defeat her claim of riparian rights is contrary to prior decisions by Florida courts. In the case of *Hayes v. Bowman*, 91 So.2d 795 (Fla. 1957), the Florida Supreme Court points out that riparian rights are appurtenances to ownership of the uplands and are not founded on ownership of the submerged lands. *Id.* at 802.

Marie Krieter reaffirms her statements that since the time of statehood, the Florida Supreme Court has acknowledged the riparian owner's right to wharf out, and that the Courts of the State of Florida have only recently equated the ownership of submerged lands with riparian rights. It it more likely than not that the Florida Supreme

Court's refusal to review the lower court opinion stems from a reluctance to encourage suits for an unconstitutional taking of property by a land use regulation. In a somewhat similar context, the Eleventh Circuit stated:

> Furthermore, in view of the Florida Supreme Court's concern to avoid a "chilling effect" on local government land use planning, it is likely that Florida courts would view with particular disfavor a claim for money damages stemming from good faith, albeit confiscatory, zoning activities on whatever theory.

Corn v. City of Lauderdale Lakes, 816 F.2d 1514, 1519 (11th Cir. 1987).

CONCLUSION

Contrary to the statements of the Trustees, Marie Krieter has never asserted that she had an unfettered right to wharf out. She has always conceded that her right is subject to the police power; however, she will never concede that her right is subject to a park power.

Respectfully submitted,

ROBERT A. ROUTA
Post Office Drawer 6506
Tallahassee, FL 32314
904/926-6300

Attorney for Petitioner
Marie M. Krieter,
Trustee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Reply to Brief in Opposition have been served this 29th day of September, 1992 by U.S. Mail upon John Costigan, Esq., Department of Natural Resources, 3900 Commonwealth Blvd., Tallahassee, Florida 32399.

Robert A. Routa